

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

SHIPPING SYSTEMS, INC.

Employer

and

Case No. 26-UC-189

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS**

Petitioner-Union

DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:¹

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are thereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.
4. The Union proposes to clarify the existing bargaining unit by including the position of assistant warehouse manager on the basis that it is not a supervisory position within the meaning of Section 2(11) of the Act. The Employer opposes

¹ The Employer and Union have filed briefs, which have been duly considered.

clarification on the grounds that the assistant warehouse manager is a supervisor within the meaning of the Act.

The Union was certified to represent the production and maintenance employees of the Employer at its Crossett facility in the 1990s. The Union received another certification on July 10, 1997 after prevailing in a decertification election. Thereafter the parties entered into a collective bargaining agreement for the period of June 30, 1997 through June 29, 2001. Currently, a new collective bargaining agreement is in effect.

The position of assistant warehouse manager was created and filled by the Employer in late 1999, this position is currently held by Keith Rollow². The issue of whether Rollow is a member of the bargaining unit or a statutory supervisor did not arise until negotiations for the new collective bargaining agreement in May and June 2001. The Employer had provided documents to the Union, pursuant to information requests, which included Rollow as a bargaining unit member. The Employer through inventory warehouse manager Beverly Culp, asserted the employer mistakenly included Rollow on the bargaining unit payroll until June 2001 because when he was promoted in late 1999, Rollow had requested he be paid hourly, rather than as a salaried nonexempt employee. Culp testified that she requested in June 2001 that Rollow switch to salary nonexempt status, which he did. Previously, Rollow asked to remain an hourly employee in order to receive a weekly paycheck as opposed to being paid twice a month as a salaried nonexempt employee. Also until June 2001, Rollow received the same benefits given to the bargaining unit employees as opposed to those of a salaried

² Rollow was not presented by the Employer to provide evidence in regard to his duties. It is noted when the Hearing Officer suggested serving a subpoena on Rollow to provide evidence the Employer's Counsel vigorously opposed such action.

employee. When Rollow was converted to a salaried employee in June 2001, he also was converted to the benefits received by salaried employees. The record reflects these benefits are the same as hourly employees with the exception of life insurance, which is paid by the Employer, and sick days.

The record reflects that the assistant warehouse manager reports to Culp and is over two (2) warehouse employees, Lee Troy Ware and Robert Leigh. Rollow's duties include: match test rack reports; help put up stock; cycle count; help unload; return paper and film; count full truckloads; double check shipping clerk; print codes; count inventory; and organize and cleanup. The assistant warehouse manager also looks for damaged boxes, assists the warehouse employees in completing paperwork, and provides employees with lists of work assignments. Rollow is paid approximately \$10.30 an hour and the warehouse employees received \$9.83 an hour prior to a 3% increase per the new collective bargaining agreement.

Supervisory status under the Act depends on whether an individual possesses the authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgement. See Ohio Power Co. v. NLRB, 176 F. 2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also Queen Mary, 317 NLRB 1303 (1995).

The party seeking to exclude an individual from voting for a collective bargaining representative has the burden of establishing that the individual is ineligible to vote. Golden Fan Inn, 281 NLRB 226, fn. 24 (1986). As stated in The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989) "in representation proceedings such as this, the burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists." Tucson Gas & Electric Co., 241 NLRB 181 (1979), Dickinson-Iron Agency, 283 NLRB 1029, 1034 (1987).

To meet its burden, the Employer asserted the assistant warehouse manager is a statutory supervisor because he disciplines employees, determines overtime for employees and assigns the employees work.

Concerning the disciplining of employees, the Employer introduced three documents into the record which are memos to the file written by Culp concerning Rollow "talking to" Leigh and Ware about work-related situations. The record reflects that Culp conceded these "talking to" documents are not verbal warnings; rather they are notes in the employees' files. Furthermore, Culp testified that the employees do not see the file notes. The manufacturing manager, J.L. Jeffers, asserted that after three (3) "talking to's", a verbal warning is issued. The progressive disciplinary system begins with the verbal warning. According to the record, such notes or memos do not

go through the disciplinary procedures. Thus, these "talking to" documents do not appear to rise to the level of discipline which would effect an employee's status and are not an indicia of supervisory status.

The record reflects that, Culp initially testified that Rollow would from time to time make decisions on whether an employee should work overtime. Leigh testified that overtime would be dictated by whether or not there was work that still needed to be completed. For example, if a truck needed to be loaded or unloaded that employee would continue to work until the task was completed even if it meant going over their regular work hours. In rebuttal testimony, Culp testified that these decisions to work overtime were mainly "no brainers" because the employees knew not to stop unloading or loading a truck just because it was quitting time; rather, the tasks needed to be finished regardless of whether it was quitting time in order to avoid a penalty being incurred against the Employer. In regard to trucks, which are late arriving to the warehouse, Culp stated the decision on whether to have an employee work overtime in those instances depends on information from the Employer's main office in Monroe, Louisiana. If the Monroe office states that the bags are "hot", the bags have to go out that day, then someone has to stay over and wait for the truck. This decision is made by Culp and Rollow. This shows that the issuance of overtime is not subject to independent judgement on the part of Rollow. Furthermore, Rollow does not order or ask an employee to work the overtime. Rather, Culp testified that when overtime is available she asks Rollow first if he wants to work it before going by seniority to Leigh and Ware.

As for Rollow's assignment of work to Leigh and Ware, the evidence does not support the conclusion that independent judgment is required. Culp stated that shipments to be made or to be unloaded are controlled by their corporate office in Monroe; thus, the employees are merely following instructions from Monroe. Rollow's basic instructions consist of telling Leigh and Ware what boxes or bags to retrieve, what to count, what warehouse to work in, etc. Rather than being the exercise of independent judgement, such instructions are dictated by the Employer's need. The Employer also asserted Rollow has the authority to determine whether the box is a "good box", which Culp conceded is fairly self-evident. Also the standards used to evaluate the boxes are those set by the Employer and do not reflect the use of independent judgement by Rollow in evaluating the boxes. The record also reflects that the packing of bags comes from experience and is known to everyone in the warehouse. Thus, Rollow does not appear to use independent judgment in assigning work.

The Employer has also raised the issue that Rollow acts as a supervisor when Culp is on vacation or performing inventory. Culp is on vacation one (1) month out of the year and performs inventory work monthly for the Employer, which may take days. Culp stated that Rollow substitutes for her in these occasions. In Aladdin Hotel, 270 NLRB 838 (1984), the test to determine the status of employees who substitute for supervisors is whether the employee spends a regular and substantial portion of their time performing supervisory tasks or whether such substitution was merely sporadic and insignificant. The record reflects that Culp is unavailable at regular intervals due to her inventory responsibilities, but the record does not reflect that Rollow has performed

supervisory functions in her absence. The record does not reflect that Rollow adjusted grievances, disciplined employees or assigned work in a manner other than previously discussed.

The Employer cites to McClatchy Newspapers, 307 NLRB 773 (1992) in which the Board found press operators were supervisors due to their authority to assign work to employees in their crews and responsibly direct them. The Board discussed the use of secondary indicia to support a finding of supervisory status. In regard to the direction of work, the Board considered the fact the press operators must exercise their independent judgement in the operation of the presses, including whether to shut the press down, which would have a significant effect on other plant employees. As previously noted in the instant case, the assignment of work and overtime is dictated by the main office in Monroe based on Employer need and does not require the use of independent judgement by Rollow. Thus, the record in the instant case does not establish that Rollow possesses authority equivalent to that found in McClatchy Newspapers.

Further, in McClatchy Newspapers, the Board pointed to a number of secondary indicia to support their finding of supervisory status while noting that secondary indicia alone does not establish that one is a supervisor under Section 2(11). In its brief the Employer cited a number of cases listing such secondary indicia as the receipt of higher wages and difference in benefits. Those cases are distinguishable from this case based on those employees possession of some primary indicia of supervisory authority. See Main Yankee Atomic Power Co. v. NLRB, 624 F. 2nd 347 (1st Cir. 1980), and American Industrial Cleaning Co., 291 NLRB 399 (1988) In the instant case, the evidence does

not reflect that Rollow possesses any primary indicia of supervisory authority. Thus, the Employer has failed to meet its burden of establishing supervisory status. Reliance on secondary indicia alone to establish supervisory status in such instance is inappropriate.

The Employer also cited NLRB v. Chicago Metallic Corp., 794 F. 2nd 527, (9th Cir. 1986) for the proposition that the perception of fellow employees is accorded consideration in finding one to be a supervisor. In Chicago Metallic Corp., the assistant production and maintenance leadman possessed the authority to issue written disciplinary warnings, directed employees in their work, attended management meetings, was perceived by fellow employees to be a supervisor and had the authority to issue discipline and reprimands. The Court found this to be a borderline case and the satisfaction of statutory criteria was debatable, which placed more weight on the perception of fellow employees. In this case Rollow does not possess the authority to issue written disciplinary warnings, direct employees using independent judgement or attend management meetings. Also, the record does not reflect that employees perceived Rollow to be a supervisor or that he possesses the authority to issue discipline even though he may have been over them. This is not a borderline case. The Employer has not established the necessary primary indicia of supervisory authority and therefore, the use of secondary indicia alone is insufficient to establish supervisory status.

Other cases cited by the Employer in its brief are factually distinguishable from the instant case and are not applicable.

Assuming the Employer's evidence is fully credited, it is insufficient to establish that Rollow possesses the primary indicia of supervisory authority. The record does not

reflect that Rollow has the authority to discipline employees or responsibly direct them, adjust their grievances or effectively recommend such action in a manner requiring the exercise of independent judgement, effectively recommend individuals for hire, lay off, transfer, promotion or reward.

As shown above, the record evidence fails to establish that the assistant warehouse manager exercises independent judgement in the performance of his duties. Thus, I find that the Employer has not established the assistant warehouse manager is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, the assistant warehouse manager is included in the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the certification is amended to include the assistant warehouse manager in the unit represented by the Union.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **October 12, 2001**.

DATED at Memphis, Tennessee, this 28th day of September 2001.

/ S /

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CLASSIFICATION INDEX
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